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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

8 LETICIA LUCERO,

9 Plaintiff,

10 v.

11 CENLAR, FSB, *et al.*,

12 Defendants.
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No. C13-0602RSL

ORDER GRANTING IN PART
BAYVIEW'S MOTION TO DISMISS

15 This matter comes before the Court on the "Motion to Dismiss of Defendant
16 Bayview Loan Servicing, LLC." Dkt. # 90. Plaintiff alleges that Bayview's primary business
17 is servicing mortgage loans, and that it acted as a debt collector in this case. Plaintiff accuses
18 Bayview of violating the Real Estate Settlement Procedure Act ("RESPA"), the Fair Debt
19 Collection Practices Act ("FDCPA"), and the Washington Consumer Protection Act ("CPA").¹
20 Bayview seeks dismissal of all of plaintiff's claims.

21 Where, as here, a motion under Fed. R. Civ. P. 12(c) is used to raise the defense of
22 failure to state a claim, the Court's review is the same as it would have been had the motion
23 been filed under Fed. R. Civ. P. 12(b)(6). McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810
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25 ¹ The Second Amended Complaint ("SAC") cannot fairly be read to assert a Deed of Trust Act
26 claim against Bayview.

1 (9th Cir. 1988). Although the complaint need not provide detailed factual allegations, it must
2 offer “more than labels and conclusions” and contain more than a “formulaic recitation of the
3 elements of a cause of action.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). The
4 Court will assume the truth of the plaintiff’s allegations and draw all reasonable inferences in
5 the plaintiff’s favor (Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987)), but the
6 allegations must give rise to something more than mere speculation that plaintiff has a right to
7 relief (Twombly, 550 U.S. at 555). The question for the Court is whether the facts in the
8 complaint sufficiently state a “plausible” ground for relief. Twombly, 550 U.S. at 570. It is
9 with that question in mind that the Court has reviewed the SAC and the memoranda submitted
10 by the parties.

11 **BACKGROUND**

12 In August 2006, plaintiff and her then-husband borrowed \$391,000 from Taylor,
13 Bean & Whitaker. Plaintiff fell behind on the payments in 2010, and a Notice of Default was
14 issued by defendant Northwest Trustee Services, Inc. (“NWTs”) on behalf of defendant Cenlar
15 FSB. Dkt. # 34-1 at 4. The notice identified Freddie Mac as the owner of the loan and Cenlar
16 as the loan servicer. Although it is not clear when or how defendant Bayview Loan Servicing,
17 LLC, got involved, plaintiff sent requests for information to both Cenlar and Bayview. There
18 was no response from Bayview, and plaintiff was unsatisfied with Cenlar’s response. SAC at
19 ¶ 61. Plaintiff alleges that defendant Bayview’s primary business is servicing mortgage loans
20 and that it is a debt collector. SAC at ¶ 7.

21 Plaintiff and Cenlar participated in mediation under Washington’s Foreclosure
22 Mediation Program. RCW 61.24.163. At the time, Cenlar was represented by the law firm of
23 RCO Legal and plaintiff was represented by Barraza Law, PLLC. SAC at ¶¶ 19-20. Plaintiff
24 was able to negotiate a modification of the loan in September 2012 and successfully navigated
25 her trial period. She entered into a permanent loan modification in January 2013, effectively
26 bringing the loan current and clearing the default. Nevertheless, Bayview continued its efforts

1 to collect on the mortgage through at least February 7, 2013, contacting plaintiff directly even
2 though she was represented by counsel. SAC at ¶¶ 67-68. Bayview also continued reporting
3 plaintiff's loan as delinquent after the default had been cleared. Plaintiff's counsel sent
4 Bayview a notice on February 13, 2013, advising Bayview that plaintiff was represented and
5 requesting that it cease and desist from contacting the client directly. Dkt. # 60-1 at 84.

6 DISCUSSION

7 **A. Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.***

8 Plaintiff alleges that Bayview violated § 2605(e)(2) of RESPA when it failed to
9 respond to her August 2012 written request for information. Plaintiff has not, however, alleged
10 that Bayview was a "servicer" as that term is defined in RESPA or alleged any facts giving rise
11 to a plausible inference that Bayview was actually "servicing" her loan. Bayview's conduct, as
12 alleged, was that of a debt collector, not a servicer. Plaintiff has not, therefore, raised a
13 plausible inference that Bayview could be liable for a failure to respond under RESPA.

14 **B. Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.***

15 Plaintiff alleges that Bayview (1) repeatedly contacted or attempted to contact
16 plaintiff directly despite knowing that she was represented by counsel and (2) continues to
17 report to the credit reporting agencies that her mortgage is in default and subject to foreclosure
18 despite the fact that she is current on her loan payments. SAC at ¶¶ 70-72. Bayview addresses
19 only the first allegation, arguing that it is not a "debt collector" for purposes of the FDCPA and
20 that, even if it were, there are no facts from which one could infer that Bayview knew plaintiff
21 was represented by counsel until after it received the February 7, 2013, cease and desist letter.
22 Dkt. # 90 at 5-6.

23 A "debt collector" is defined as "any person who uses any instrumentality of
24 interstate commerce or the mails in any business the principal purpose of which is the
25 collection of any debts, or who regularly collects or attempts to collect, directly or indirectly,
26 debts owed or due or asserted to be owed or due another. . . ." 15 U.S.C. § 1692a(6). The facts

1 alleged in the SAC give rise to the plausible inference that Bayview was acting as a debt
2 collector when it contacted plaintiff: the debt was owed to another, the contacts occurred long
3 after the loan was in default, and Bayview's communications identify it as a debt collector.
4 See Dkt. # 60-1 at 80. Bayview's current assertion that it was simply "reaching out to
5 [p]laintiff to explore home retention options" is simply implausible. Dkt. # 90 at 5-6.

6 Plaintiff has not, however, alleged facts giving rise to an inference that Bayview
7 violated 15 U.S.C. § 1692c(a), which precludes a debt collector from communicating directly
8 with a consumer in connection with the collection of the debt "if the debt collector knows the
9 consumer is represented by an attorney with respect to such debt" Plaintiff focuses on the
10 fact that the same law firm, RCO, represented both Cenlar and Bayview, but ignores the timing
11 of the representations. There are no allegations or facts suggesting that RCO, which knew
12 plaintiff was represented by counsel, was representing Bayview when the offending
13 communications took place. Based on the existing record, there is no reason to believe that
14 RCO represented Bayview at any time prior to April 2013 when this litigation was filed and
15 therefore no basis on which to impute RCO's knowledge to Bayview during the relevant time
16 period.²

17 **C. Washington Consumer Protection Act ("CPA"), RCW 19.86 *et seq.***

18 The CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts
19 or practices in the conduct of any trade or commerce." RCW 19.86.020. A private cause of
20 action exists under the CPA if (1) the conduct is unfair or deceptive, (2) occurs in trade or
21 commerce, (3) affects the public interest, and (4) causes injury (5) to plaintiff's business or
22 property. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780
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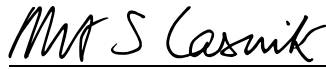
24 ² In its reply memorandum, Bayview asserts that "[i]t is undisputed that Bayview's role with
25 respect to [p]laintiff's loan was to assist her with a loan modification." Dkt. # 100 at 2. To the extent
26 plaintiff may be able to allege facts showing that Bayview was involved in the loan modification process
and knew that she was represented by counsel, she may amend her FDCPA claim.

1 (1986). Plaintiff alleges that all of the named defendants violated the CPA when they falsely
2 represented that MERS was the beneficiary of the Deed of Trust with the power to transfer a
3 beneficial interest to Cenlar. There are no facts from which one could conclude that Bayview
4 had any role in the representation, however, and plaintiff has not identified any other unfair or
5 deceptive acts or practices on the part of Bayview.

6 **CONCLUSION**

7 For all of the foregoing reasons, Bayview's motion to dismiss is GRANTED in
8 part and DENIED in part. Plaintiff's RESPA and CPA claims are DISMISSED. Plaintiff's
9 FDCPA claim regarding communications with a represented consumer are DISMISSED with
10 leave to amend. Plaintiff's FDCPA claim regarding false reporting to the credit reporting
11 agencies was not addressed and may, therefore, proceed.

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13 Dated this 3rd day of October, 2014.

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15 Robert S. Lasnik
16 United States District Judge
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